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The Regulation of Foreign Banks in Canada: Milelli Marks a Decade of Ambiguity

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THE REGULATION OF FOREIGN BANKS IN CANADA: MILELLI MARKS A DECADE OF AMBIGUITY

Gillian Lester*

CONTENTS

I. Introduction ................................................................. 430
II. The Purpose of the Foreign Banking Provisions in the Act ............. 431
  1. The Meaning of "Foreign Bank" .................................... 433
  2. Banking and the Bank Act ........................................... 434
     (a) "Business of Banking" ......................................... 435
     (b) "Banking Business" ............................................ 437
        (i) Direct Banking Business .................................. 437
        (ii) Indirect Banking Business ............................... 438
        (iii) Summary of Foreign Banking Provisions ............. 442
  3. Banking Business in the Common Law Tradition ...................... 444
     (a) The Essential Features of Banking .......................... 444
  4. Banking and the Constitution ..................................... 446
III. R. v. Milelli .............................................................. 448
   1. District Court ...................................................... 449
   2. Court of Appeal .................................................... 450
IV. Conclusions ..................................................................... 452

I. INTRODUCTION

The recent decision of the Ontario Court of Appeal in R. v. Milelli1 culminates a decade of ambiguity in the laws regulating foreign banks in Canada. The case deals with the interpretation of s. 302(1)(a) of the Bank Act,2 which prohibits foreign banks from

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2 S.C. 1980-81-82-83, c. 40 (Part I, s. 2) (hereafter the "Bank Act" or the "Act").
undertaking "any banking business" in Canada. The provisions are cryptic and contain no definition of the term "banking business". This has left foreign banks at the caprice of the statute. They are uncertain about the extent to which they are permitted either to deal with Canadian customers directly, or to participate in co-operative transactions (such as syndicated loan agreements) with Canadian chartered banks. As leave to appeal was refused by the Supreme Court of Canada, it appears that, for the time being, the courts will be of no assistance in clarifying the intention of the Act.

In this article, I will argue that the foreign banking provisions of the Act fail to satisfy the legislative ideals of clarity and coherence. To that end, I will proceed as follows. I will begin with a discussion of the Parliamentary motivations underlying the foreign banking laws. In the same section, I also will consider judicial interpretations of banking in general (pertaining to other statutes) and interpretations of other sections of the Bank Act. In the third section, I will analyze the Milelli decision. Finally, in the concluding section, I will comment briefly on the problems within the Act and suggest some tentative revisions that might clarify the laws regulating foreign banks.

II. THE PURPOSE OF THE FOREIGN BANKING PROVISIONS IN THE ACT

Prior to 1980, there was scanty legislation dealing with the activities of foreign banks. Foreign banks were not permitted to operate or describe themselves as banks because they could not become chartered under the Act, and there were no provisions in the Act to encourage them to incorporate subsidiaries for conducting banking business in Canada. Typically, foreign banks incorporated affiliates or "near banks" in Canada which, though not banks, carried out, unregulated, many aspects of banking business in Canada. Alternatively, they sent "suitcase bankers" to Canada to solicit Canadian customers for their banks outside the country.3

In May of 1978, the Honourable Jean Chrétien, then Minister of Finance, introduced to the House of Commons Bill C-57, which

proposed reforms to the Act. These reforms were largely consistent with the recommendations of a 1976 White Paper released by the Minister of Finance. The White Paper expressed concern that during the late 1960s and early 1970s, foreign banking interests in Canada had rapidly expanded, and in some cases were not subject to standard Canadian controls over banking. It noted that financial subsidiaries of foreign banks were able to provide various services, some of which (e.g., financial leasing and factoring) were not provided by Canadian banks. They did so outside the constraints of federal financial safeguards, such as reserve requirements. Furthermore, it was felt that foreign banks might pose unfair competition to Canadian banks. As the White Paper put it:4

Many have some advantage in the Canadian money market, particularly over the smaller Canadian banks and other Canadian borrowers in that market, through the use of the guarantee of their obligations by the parent bank. Although they compete with the Canadian banks, they are outside the scope of such forms of central bank influence as moral suasion or other techniques aimed at influencing or controlling the banking system.

The White Paper did, however, emphasize that the regulated entry of foreign banks into the Canadian market was to be encouraged because of the healthy competition that it would create, and because of the potential for reciprocal recognition of Canadian banks in other countries. The major thrust of the White Paper was to propose that “foreign banks who have or intend to establish in Canada banking operations on any significant scale [such as] engaging in both the making of loans and the accepting of deposits transferrable by order will be required to incorporate as a bank under the Act or to cease engaging in this combination of activities.”5

Parliament responded to the White Paper by incorporating into the current Act the above proposal. In particular, the words “directly or indirectly” were added to the then existing prohibition on the undertaking of any banking business in Canada by foreign banks. The current provision reads:

302(1) A foreign bank shall not, directly or indirectly,

(a) undertake any banking business in Canada,

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5 Ibid., at p. 26.
It is followed by detailed provisions outlining the restrictions on direct and, particularly, indirect activities by foreign banks.

Although the term "foreign bank" is clearly defined in the Act, the drafters included nothing to define the meaning of "banking business" as it is used in s. 302(1)(a). In the remainder of this section, I will first outline the definition of "foreign bank". Then, by examining the foreign banking provisions of the Act, I will attempt to determine the kind of "banking business" that s. 302(1)(a) was designed to prohibit. Finally, I will discuss both the common law interpretation of banking as it pertains to other statutes, and judicial considerations of different sections of the Bank Act.

1. The Meaning of "Foreign Bank"

Section 2(1) of the Act defines "foreign bank" very broadly. In addition to financial institutions incorporated outside Canada that function as or call themselves banks, the definition includes all affiliates and subsidiaries of such institutions. Thus, a company

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6 "foreign bank" means a corporation, association, partnership or other institution incorporated or established by, pursuant to or in accordance with the laws of a country other than Canada, or a department or agency of the government of a country other than Canada or a political subdivision of such a country, that

(a) is a bank according to the laws of any country other than Canada where it carries on business,

(b) carries on a business in a country other than Canada that, if carried on in Canada, would be wholly or to a significant extent, the business of banking,

(c) acquires, adopts or retains a name that, in any language, includes the word "bank", "banks" or "banking", either alone or in combination with other words, or any word or words of import equivalent thereto to indicate or describe its business,

(d) engages in the business of lending money and accepting deposit liabilities transferable by cheque or other instrument,

(e) is an affiliate of a corporation that is a foreign bank within the meaning of this definition, or

(f) controls a corporation that is a foreign bank within the meaning of this definition,

but does not include

(g) an affiliate of a Schedule A bank,

(h) a corporation, association, partnership or other institution, or department or agency of a government, that is a foreign bank within the meaning of this definition by reason only of paragraph (c) or (e) and that is not in the business of engaging in financial activities, or

(i) a corporation, association, partnership or other institution, or department or agency of a government, that is exempted from being a foreign bank by order of the Minister made pursuant to subsection (3), which order has not expired as provided in that subsection;

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7 According to s. 2(2)(e) of the Bank Act, "one corporation is affiliated with another corpo-
may engage in no banking activity, yet be characterized as a foreign bank for the purposes of the Act. In practice, it seems, "most financial institutions will have within their corporate group an entity that either looks like a bank or acts like a bank somewhere in the world and which is therefore caught by the definition 'foreign bank'."  

Note that an institution will not be classified as a "foreign bank" merely by virtue of its affiliation or parent-subsidiary relation with a foreign bank, unless it is itself in the business of financial (but not necessarily banking) activities. Furthermore, s. 2(3) of the Act provides that the Minister may order that certain corporations are exempt from classification as a "foreign bank". However, such an exemption order must be requested by the institution.

2. Banking and the Bank Act

A particular difficulty in characterizing "banking business" for the purposes of the Act lies in the fact that the term "banking business" appears in s. 302(1)(a), while "business of banking" is used in other sections. It is unclear whether the Act intends the two terms to represent the same concept, or to have separate and distinct meanings. It is conceivable, for example, that one phrase refers to banking in the narrow sense of the institution of a bank, while the other represents banking in the wider all-inclusive sense, that is, "comprehending activities carried on by those who . . . popularly, are called bankers".

In the following section, I will examine critically each of the two terms to assess whether we are to give them the same or different meanings when reading the Act.

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(a) "Business of Banking"

The terms "banking" and "business of banking" as used in s. 173(1) of the Act have been judicially considered on several occasions. Section 173(1) defines the term "business of banking" and appears in the portion of the Act dealing with domestic banks. It begins with the phrase,

173(1) A bank may engage in and carry on such business generally as appertains to the business of banking and, without limiting the generality of the foregoing, may

and then goes on to list a range of activities.

In previous versions of the Act, s. 75 (now s. 173) was structured so that "engage in and carry on such business generally as appertains to the business of banking" was the last of five categories of permitted banking activities. This drafting led to confusion as to whether that final phrase was intended as a basket clause, or referred instead to a fifth category of activities that fell under the rubric of "business of banking".

In *Central Computer Services Ltd. v. Toronto-Dominion Bank*, it was held that computerized payroll and accounting services offered to bank customers were within the classification of "banking" for the purposes of s. 75 of the former Act. Mr. Justice Monnin stated that:

Parliament never intended to establish a fixed or restricted definition of banking by enumerating paras. (a) to (d) of s. 75(1). Banking must have a much broader meaning. English and Canadian authorities have yet to define the terms of bank and banker. All the textbook writers on banking confirm this statement that there is no exact definition of a banker or a bank. In fact and in practice, banking is what banks do for the carrying on of their business ...

Later, in the same judgment, O'Sullivan J.A. compared the meaning of "banking" in the Bank Act to the broad meaning it is given in s. 91 of the Constitution.

In *Laarakker v. Royal Bank of Canada*, the Ontario High Court took a functional approach in considering the scope of s.

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9a See R.S.C. 1970, c. B-1, s. 75(1)(e).
13 (1980), 118 D.L.R. (3d) 716, 31 O.R (2d) 188.
75(1) of the Act. Anderson J. concluded that the "central consideration is the purpose or object of the bank in engaging in the impugned undertaking". Thus it was held that a bank's photographing of customers as they arrived at the bank was part of the business of banking because it was a promotional activity consistent with the bank's purpose, rather than a separate business of portrait photography.

Most recently, the case of Canadian Deposit Insurance Corp. v. Canadian Commercial Bank, dealt with whether "business of banking" includes the use of participation agreements in loan transactions. The court found that although some fiduciary obligations were created as a result of participation agreements, these obligations were merely ancillary and incidental to the predominant purpose of syndicating a loan, the latter being part of the business of banking. Therefore, the agreements fell within the "business of banking" in s. 173 of the Act, and did not violate the prohibition in s. 174 against banks acting as trustees.

Perhaps the best evidence that the Act intends "business of banking" to be interpreted broadly is that, as noted above, when the Act was revised in December 1980, the wording of s. 75 was modified. The phrase, "engage in and carry on such business generally as appertains to the business of banking" was moved from the end of s. 75 to the preamble of s. 173 in the new Act and qualified with the phrase, "and, without limiting the generality of the foregoing".

Crawford and Falconbridge, and Baxter, the authors of authoritative texts on banking law in Canada, support this notion of a broad interpretation of "business of banking". Crawford and Falconbridge comment on the wording of s. 173: It is plain that the business of banking is not a single specific activity. The courts have recognized this as has the Bank Act which, after authorizing banks to "engage in and carry on such business generally as appertains to the business of banking" proceeds to list, in sixteen separate paragraphs, activities that are expressly made a part of that business. But even this extensive catalogue of powers is expressed to be "without limiting the generality" of that term and there has been judicial acceptance of the fact that the true scope of the term is broader than the listed activities.

14 Ibid., at p. 720 D.L.R., p. 191 O.R.
16 Supra, footnote 3, at p. 11.
Baxter similarly writes:17

Probably the intention of the legislature was to authorize all these activities which the Canadian business world would generally regard as being within the sphere of banking. Presumably, the clause is not meant to authorize any business which a bank chooses to undertake, but on the other hand commercial opinion as to the proper sphere for banking may vary ....

Finally, one may look to other sections of the Act for an indication of the sense in which “business of banking” is to be interpreted. Section 303(8) of the Act circumscribes the activities of a non-bank affiliate of a foreign bank “that carries on as part of its business any aspect of the business of banking”. The words “any aspect” in conjunction with “business of banking” would also imply that the latter term is not restricted in its meaning to a bank in the narrow sense.

(b) “Banking Business”

How, then is “banking business” to be understood in s. 302(1) of the Act? If the Act uses two different expressions in order to construe separate notions of banking, then, as a corollary to the conclusion that “business of banking” has a broad meaning, “banking business” may be a narrow concept. Therefore, s. 302(1)(a) may be designed only to prohibit foreign banks from entering Canada to establish banks as businesses in the narrow sense. An examination of the foreign banking provisions themselves, construed as a whole, may assist us in reaching such a conclusion.

(i) Direct Banking Business

Section 302(1) specifically prohibits two direct activities, namely maintaining a branch18 and operating an automated teller machine.19

Although a foreign bank may establish a representative or head office in Canada,20 it may not actually engage in banking business through such offices. Rather, the representative office is limited in its activities to promoting or acting as liaison for the foreign bank.21 The term “liaison” is not defined in the regulations.

18 Section 302(1)(b).
19 Section 302(1)(c).
20 Sections 302(2)(a) and (c).
21 Foreign Bank Representative Offices Regulations, SOR/81-309, Can. Gaz., Part II, Vol. 115, No. 8, p. 1202, s. 5(1)(a) and (b).
However, before the current Act was passed, Parliament discussed the regulation of representative offices. The explanation accompanying a recommendation that the now current provisions be adopted read in part:22

It was pointed out that these offices do not carry on banking business in Canada but instead represent the parent bank and provide referrals of Canadian banking business to an office of the parent bank outside Canada . . . . The Committee is satisfied that representative offices are an aspect of international banking that cannot be eliminated.

Furthermore, the representative office cannot be occupied or controlled by any Canadian corporation, and its personnel may only be employees of the foreign bank.23

Similarly, the head office of a foreign bank is permitted only to “issue directions and do all other things reasonably necessary to the conduct of its banking outside Canada”,24 and then only with the permission of the Governor in Council. This suggests that, in the absence of special approval, even such “reasonably necessary” activities in Canada are prohibited.

It is clear from the preceding discussion that the Act carefully circumscribes direct banking business by foreign banks. However, the provisions relating to direct activities do little to assist us in determining the scope of the term “banking business”. Therefore, it is necessary to delve deeper into the Act and explore the more detailed provisions relating to indirect banking business.

(ii) Indirect Banking Business

The Act purports to ensure that a foreign bank does not do indirectly what it is prohibited from doing directly. It contemplates several types of indirect activity by a foreign bank, and places limitations on those activities to preclude their taking on the character of banking business.

Foreign bank subsidiaries

The Act permits a broad range of activities by a foreign bank subsidiary.25 A foreign bank subsidiary is chartered under the Act

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23 Bank Act, 302(3).
24 Ibid., s. 302(2)(c), emphasis added.
25 Section 302(2)(b). Where a bank is a Schedule B bank (i.e., where 10% or more of the voting shares of a bank are held by any one resident or non-resident) by virtue of the holdings of one or more foreign banks, it is called a “foreign bank subsidiary” (see ss. 2, 5 and 174(2)(c) of the Act).
and may do essentially what other Canadian chartered banks may do. However, there are some restrictions in the Act which purport to ensure that foreign interests do not undermine fair competition within the Canadian banking regime. For example, stricter incorporation requirements are imposed on foreign bank subsidiaries than on other Canadian banks. Before approving the incorporation of a foreign bank subsidiary, the Minister of Finance must be satisfied that it “has the potential to make a contribution to competitive banking in Canada” and that it will receive the same treatment as other banks governed by the Act.26 Furthermore, the incorporation or a change in the authorized capital of a foreign bank subsidiary will not be approved if it will have the effect of raising the total domestic assets of all banks in Canada.27

In addition to special incorporation requirements, there are measures to preclude foreign banks from using subsidiaries as mere vehicles through which to carry on their own transactions in Canada. Before commencing operations, a foreign bank subsidiary must receive a licence from the Minister. Frequent renewals of the licence are required during the early years of operation to facilitate Ministerial monitoring.28 In essence, the licence contains two limitations: the subsidiary cannot lend money or give credit to its foreign parent, and it cannot give guarantees on behalf of the parent. An exception is made where the transaction is on the same terms and conditions applicable to loans and guarantees made in the ordinary course of business of the foreign bank subsidiary and is for short-term liquidity purposes only.29 Furthermore, a foreign bank subsidiary may not provide banking services to a non-bank affiliate of the parent. These restrictions ensure first that the interests of the depositors are not compromised by favouritism toward the parent bank or its affiliates, and second, that domestic banks are not put at a competitive disadvantage relative to subsidiaries backed by parents operating outside the Canadian regulatory regime.30

26 See s. 8(d).
27 Section 302(7) of the Act. Note that the Act to Implement the Free Trade Agreement Between Canada and the United States of America, S.C. 1988, c. 65, s. 47, amends the Act so that a foreign bank subsidiary controlled by a United States resident is not considered a foreign bank subsidiary for the purposes of s. 302(7).
28 Section 28 of the Act requires that this licence be obtained. During the first five years it must be renewed at least once a year, and thereafter, at least once every three years.
29 Section 306.
30 For further discussion of the Act’s treatment of foreign bank subsidiaries, see U. Menke,
An interesting point to note is that the Act anticipates that foreign bank subsidiaries will enter loan participation agreements with their parent bank. Indeed, s. 190(8) of the Act provides that as long as the subsidiary advances at least 50% of the loan funds, there is nothing to prevent it from syndicating the loan with other institutions, including foreign banks. Moreover, s. 190(9) permits the foreign bank to purchase the subsidiary's share of the loan after a two-year period.

Non-bank affiliates

The Act also limits the activities of non-bank affiliates of foreign banks. Section 303(1) defines a "non-bank affiliate" as any Canadian corporation where more than 10% of the voting shares are held by a foreign bank or a corporation associated with a foreign bank. An examination of the provisions relating to non-bank affiliates is particularly useful to our analysis because it was the activities of these entities that triggered the creation of the existing prohibitions on foreign bank activities in Canada. According to a report presented to Parliament in 1983, the revised Act attempted to eliminate the unfair advantage of non-bank affiliates of foreign banks.
... in the lucrative market for medium-sized commercial loans. Since the non-bank subsidiaries were not officially banks, they escaped virtually all banking regulations and supervision, and were able to use the guarantee of their parent to fund their loans with money market instruments issued in Canada.

In Parliamentary discussions leading up to the revision of the Act in 1980, this matter was discussed. Recommendation 47 proposed that “the government consider the development of tighter legislative language that would preclude the carrying on of banking business in Canada by any methods other than those provided for in the proposed Act”. It was accompanied by the following explanation:

... concern is expressed that the provisions of the proposed Act are not sufficient to encourage these affiliates to become banks under the proposed Act. ... The only measure that would penalize their continued operation as non-bank affiliates is the withdrawal of the right to use the guarantee of the parent bank in raising funds in Canadian financial markets ....

In response to the concern that entities not caught under the definition of a bank for the purposes of the Act would engage in banking business, the drafters did two things. First, they created a base prohibition against affiliates, alone or in collaboration with other affiliates, carrying on banking business under a non-bank guise. A non-bank affiliate cannot both lend money and accept deposit liabilities transferable by cheque or other instrument, nor can it circumvent this provision by doing only one of the above while another affiliate does the other. Second, if the affiliate is engaged in “any aspect of the business of banking” it cannot use the parent as a guarantor unless authorized by the Minister. We see here that the Act clearly contemplates some aspects of the “business of banking” on the part of affiliates. However, once the parent becomes involved as a guarantor, it would appear that those activities take on the colour of “banking business” (apparently a concept distinct from “business of banking”) and are thus prohibited. This is consistent with Crawford and Falconbridge’s notion that:

... some activities are “banking” only because they are performed by

34 White Paper, supra, footnote 4.
35 Section 303(5)(a).
36 Section 303(5)(b).
37 Section 303(8).
38 Supra, footnote 3, at pp. 11-12.
bankers or, perhaps more accurately, only when they are performed by bankers. For example, para. 173(1)(f) states that banks may lend money. But so may virtually anyone else, and make it their business to do so without thereby engaging in "banking". But no one doubts that lending money is "banking" when it is done by banks .... There are other activities authorized in sub-s. 173(1), ranging from acting as a financial agent to selling lottery and urban transit tickets, that no one would think of describing as banking, but which appear to have been made a part of the business of banking by Parliament when they are carried on by banks.

**Foreign bank ownership of shares in other Canadian corporations**

Section 305 of the Act is designed to preclude foreign banks from using foreign bank subsidiaries to gain an advantage over domestic banks in their ability to own other Canadian corporations. Stated briefly, where a foreign bank or a corporation associated with a foreign bank owns shares in a foreign bank subsidiary, it cannot acquire or own shares in any other bank or hold a sufficient number of shares in any other corporation which carries on banking activities or obtains services from the foreign bank subsidiary, to give it more than 10% of the total voting rights in that corporation.39

**(iii) Summary of Foreign Banking Provisions**

The net result is that if a foreign bank wishes to operate as a banking institution in Canada, it must incorporate a foreign bank subsidiary. Nothing about this type of arrangement is contrary to the Act, because a subsidiary is chartered under the Act and subject to the same regulations as an ordinary Canadian bank. If the parent wishes to guarantee a debt or security issued by the subsidiary, it can do so only for isolated transactions (for the purposes of short-term liquidity) and even then only for transactions in the ordinary course of the subsidiary’s business.

If the foreign bank operates in Canada merely via its interest in a non-bank affiliate, it is much more restricted. The most it can do, unless it has special Ministerial approval, is to guarantee securities issued or money borrowed by the affiliate, and even then only if the affiliate is not engaged in any aspect of the business of banking. However, is it not the case that borrowing money and issuing securities themselves can be viewed as aspects of the business of

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39 See generally s. 305.
banking? It would seem that, in the case of non-bank affiliates (as with subsidiaries), one must assume that the Act contemplates such guarantees as isolated transactions only. Stated differently, it appears that a non-bank affiliate can undertake any aspect of the “business of banking” as long as parental involvement by way of a guarantee does not give it the colour of “banking business”.

The above conclusion begs the question of whether a foreign bank can directly engage in what is called the “business of banking”. To state the converse of an earlier assertion, it would seem illogical for the Act to have intended that a bank be able to do directly what it is unable to do indirectly. One could reasonably conclude, therefore, that s. 302(1) was drafted with the intention that “banking business” be interpreted as broadly as “business of banking”. In other words, where a foreign bank undertakes direct business in Canada, even if it falls outside the narrow business traditionally associated with a bank (i.e., lending money and accepting deposits transferable by cheque), the mere fact that it is performed by a bank, more particularly a foreign bank, could place it into the class of activities considered “any banking business” in s. 302(1) of the Act.

The fact that a foreign bank can enter into participation agreements with its subsidiaries, and actually purchase the subsidiary’s interest after two years, suggests that the Act does not follow the above logic. However, in such circumstances, the subsidiary has at least a 50% interest when the loan is executed and its terms are decided. Thus, at least half of the loan is provided by a bank which is subject to Canadian banking laws. This would be consistent with the intention that banking business undertaken in Canada be subject to the constraints of Canadian banking regulation.

Where, then, do we stand? On the one hand, the White Paper preceding the implementation of the foreign banking provisions suggested that Parliament really hoped to target foreign banks entering Canada to undertake the narrow activity of making loans while at the same time accepting deposits transferable by order. However, the logic of the resulting provisions is unclear. As this section of the paper has shown, it is also possible to construe them broadly, as confining the activities of foreign banks, so that foreign banks are not permitted to engage in any of the activities that fall within the business of banking generally.

40 Supra, footnote 5 and accompanying text.
3. Banking Business in the Common Law Tradition

With the exception of Milelli, Canadian banking jurisprudence has not addressed the meaning of "banking business" for the purposes of s. 302. English courts have, however, attempted over the years to characterize "banks", "banker", "banking business" and "business of banking" in the context of other statutes. These characterizations, though not specific to the Act, have helped to shape the popular conception of banking and, as such, create some of the confusion we see in Milelli.

(a) The Essential Features of Banking

One of the earliest cases to address the question was Re Bottomgate Industrial Co-operative Society in which Smith J. stated that the society under scrutiny would be considered a bank:

... if the society carried on what is a principle part of the business of a banker, viz receiving money on deposit, allowing the same to be drawn against as and when the depositor desires, and paying interest on the amounts standing on deposit.

In N. Joachimson v. Swiss Bank Corp., the English Court of Appeal considered the question whether a demand from a customer is necessary before a banker must release money credited to an account. In holding that a demand is necessary, Atkin L.J. elaborated on what constitutes the principal part of the business of a banker:

The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch ....

Several years later, in Bank of Chettinad Ltd. of Colombo v. Commissioner of Income Tax, Colombo, the Privy Council assessed whether a non-resident banker was carrying on the business of banking in Ceylon for the purposes of Ceylon's Income Tax Act.

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41 (1891), 65 L.T. 712.
42 Ibid., at p. 714.
43 [1921] 3 K.B. 110.
44 Ibid., at p. 127.
Tax Ordinance. Lord Morton of Henryton succinctly defined a company in the business of banking as "a company which carries on as its principal business the accepting of deposits of money on current account or otherwise, subject to withdrawal by cheque, draft or order." 46

The English Court of Appeal reviewed the earlier authorities in United Dominions Trust Ltd. v. Kirkwood,47 in which the appellant trust company alleged that it was carrying on the business of banking rather than money-lending (in England, a distinction is made between the two) and, as such, was not liable for having failed to become licensed under the Money-lenders Act. After citing Joachimson and Bank of Chettinad with approval, Lord Denning M.R. summarized the characteristics of bankers:48

... (i) They accept money from, and collect cheques for, their customers and place them to their credit; (ii) They honour cheques or orders drawn on them by their customers when presented for payment and debit their customers accordingly. These two characteristics carry with them also a third, namely: (iii) They keep current accounts, or something of that nature, in their books in which the credits and debits are entered.

It appears, finally, that an agency relationship will not permit a business to escape characterization as a bank. In Re Roe's Legal Charge, Park Street Securities Ltd. v. Roe,49 the English Court of Appeal dismissed a business' claim that because the amount of money advanced by way of loans grossly outweighed the amount held on deposit, it was effectively money-lending rather than banking. It also rejected the contention that the business could not be a bank because it had no physical premises of its own, did not advertise, and was not listed in the telephone directory. The court held that the plaintiff was a bank because it used another business as its agent to perform the operations of a bank. These included:50

... opening and maintaining current, deposit and advance accounts for the plaintiff's customers, accepting money in cash, cheques or transfers for the credit of their accounts, arranging for the plaintiff's customers' cheques when drawn on other banks to be cleared through the clearing banks, paying cheques drawn on the plaintiff's customers' accounts and providing the plaintiff's customers with cheque books and paying in books.

46 Ibid., at p. 383.
48 Ibid., at p. 447.
50 Ibid., at p. 376.
In evaluating the legitimacy of the agency arrangement, the court noted that the agent kept separate books of account and records with respect to the bank’s customers’ accounts, and that all accounting records, including cheques, were in the name of the plaintiff bank only. Furthermore, the court assumed that the customers were aware of the plaintiff bank’s relationship with the agent. Finally, the court was satisfied that the plaintiff bank’s board of directors retained control of all operations carried out by the agent.

4. Banking and the Constitution

In Canada, the applicability of the Bank Act, which is federal legislation, has sometimes turned on questions of constitutional jurisdiction. Therefore, the meaning of “banking” within s. 91(15) of the British North America Act, 1867 (now the Constitution Act, 1867) has been considered on several occasions. The case law reveals the evolution of a conceptual distinction between a banking business as an institution and banking business in the sense of the kinds of activities that, although usually performed by banks, do not in themselves amount to a banking business.

In Re Bergethaler Waisenamt, the court discussed this distinction when faced with the question whether the activities of a particular corporation were subject to federal scrutiny pursuant to s. 91(15) of the Constitution. The corporation had been involved in a wide range of activities, including accepting deposits, paying cheques on demand, dealing in exchange, arranging credit, lending money and issuing securities. The court noted that most banks carry on the totality of the above functions, but then highlighted the fact that “it does not follow from the fact that banks perform them that every exercise of one or more of the functions is a form of banking.”

52 Ibid., at p. 776 D.L.R., p. 198 C.B.R. To be more specific, the activities of the corporation were enumerated in the judgment, ibid., at pp. 773-4 D.L.R., pp. 194-5 B.L.R., as:

(1) Receiving money on deposit from customers. (2) Paying a customer’s cheques or drafts on it to the amount on deposit by such customers, and holding Dominion Government and Bank notes and coin for such purpose. (3) Paying interest by agreement on deposits. (4) Discounting commercial paper for its customers. (5) Dealing in exchange and in gold and silver coin and bullion. (6) Collecting notes and drafts deposited. (7) Arranging credits for itself with banks in other towns, cities and countries. (8) Selling its drafts or cheques on other banks and banking correspondents. (9) Issuing letters of
The judgment contains the oft-quoted concurring opinion of Coyne J.A. that:\(^{53}\)

Banking is not a technical or legal term but a loose popular one, comprehending activities carried on by those who, likewise popularly, are called bankers. Of these activities some are often and some are usually carried on by bankers. Some are essential to the conception. But very few are exclusive activities of bankers. ... 

The presence of many positive features which are essential to banking does not make a business embracing these features, or a combination of some of them, a banking business ... .

Coyne J.A. did indicate that if there is any real test which distinguishes a bank from another business, it is probably "'receiving money to be withdrawn by cheque' ".\(^{53a}\) Furthermore, he emphasized, holding oneself out to the public as a bank is an important indicator of having a banking business.

This case gave rise to the narrow notion that to fall within federal regulatory jurisdiction, a business had to display certain "core" features of banking. However, the precise nature of those core activities has at times been a slippery issue. For example, in *Re Stouffville District Credit Union Ltd. and Village of Stouffville*,\(^{54}\) the court found that a credit union which accepted money on deposit, paid interest on it, and allowed customers to withdraw money by cheque was not carrying on a banking business. It emphasized the fact that the credit union was merely an agent; it passed its customers' deposits and cheque demands to a chartered bank, which then held or released the funds.

In *Canadian Pioneer Management Ltd. v. Labour Relations Board of Saskatchewan*,\(^{55}\) the Supreme Court of Canada was faced with the question of whether a company incorporated as a trust company under the Trust Companies Act was engaged in "banking" for the purposes of s. 91(15) of the British North America Act. Beetz J., for the majority, stated:\(^{56}\)

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\(^{56}\) *Ibid.* at p. 25 D.L.R., p. 466 S.C.R.
The characterization of legislation and the characterization of a business are not identical processes . . . . The concept of banking as a business and the meaning of the word “banking” in s. 91(15) are not necessarily co-extensive; the meaning of “banking” in the section might very well be wider than the concept of banking as a business.

The court noted that in recent times there has been a considerable overlapping of functions between banks and other types of institutions, such as trust companies. As a result, the court rejected using a functional approach to identify a banking business:

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... to resolve the issue, we should adopt an institutional approach. Such an approach, it is true, emphasizes formal tests. ... I agree with the contention which I quote from the factum of the Attorney General for New Brunswick that

" ‘Banking’ involves a set of interrelated financial activities carried out by an institution that operates under the nomenclature and terms of incorporation which clearly identify it as having the distinctive institutional character of a bank."

In summary, the Canadian constitutional jurisprudence has created a distinction between a banking business (i.e., a business having the essential institutional qualities of a bank), and banking generally. The latter concept is broad in its scope, encompassing all activities that banks may, at various times, carry on in the course of their business. For the purposes of the division of powers, the courts generally have followed the English tradition of characterizing banking according to the former, institutional, definition. The essential qualities of a banking business are accepting deposits of money and honouring withdrawal requests (e.g., by cheque) by customers. Thus, the courts essentially defer to what the federal government is prepared to call a bank in this narrow sense.

III. R. v. MILELLI

Most of the English and Canadian constitutional jurisprudence reviewed above uses the terms “banking business” and “business of banking” interchangeably. A clear example of this appears in the Canadian Pioneer case, where Beetz J. concluded:

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And finally, Parliament, which is the competent constitutional authority in matters of banks and banking, considers that Pioneer Trust is not a bank and

57 Ibid. at p. 24 D.L.R., p. 465 S.C.R.
58 Ibid., p. 28 D.L.R., p. 470 S.C.R.
that its business is not the banking business. Hence Pioneer Trust is not in the business of banking.

However, as evident from my earlier analysis of the Act, it may be dangerous to generalize from existing case law that the two terms are also interchangeable when used in the Act.

1. District Court

Indeed, this was the conclusion of LeSage A.C.J. in the District Court in *Milelli* on appeal from the Provincial Court. In *Milelli*, Judge LeSage concluded that "banking business" was to be interpreted in the narrow sense. The learned trial judge had found the accused, a bank incorporated in Montseraat, and one of its directors to be issuing letters of credit, lending money and accepting term deposits in Canada. He held that:

... the central issue as I see it in this case, is not whether the corporate accused is in fact a bank to which the *Bank Act* applies, but whether it directly or indirectly undertook any and I emphasize the word any banking business in Canada contrary to s. 302(1)(a) of the *Bank Act*.

He concluded that:

The Crown has proven three direct undertakings by the corporate accused which all come within the words banking business ... .

Judge LeSage set out the problem as follows:

The issue as I see it is, are these three activities of banking sufficient to conclude that the appellants "did undertake banking business in Canada"?

It is noteworthy that he deleted the word "any" from the undefined term, "undertake any banking business" as it appears in the Act. He looked to the constitutional interpretation in *Re Bergethaler Waisenamt, United Dominions Trust* and *Canadian Pioneer* for assistance in defining "banking business". He found that the appellants were not engaged in those activities which constitute the essential features of banking:

I recognize that the Supreme Court of Canada was, in [Canadian Pioneer], determining whether or not the operations of the company fell under the

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60 *Ibid.*, at p. 3 of the Judgment, emphasis added.
jurisdiction of the Saskatchewan Labour Relations Board or the Canada Labour Code, and thus the purpose of the enquiry was different than in this case. Nevertheless, it dealt with the issues of "banking business" and I am bound by it.

His conclusion that the appellants were not engaged in banking business was based in part on his finding that they did not have a reputation of being bankers in Canada, that is, they were little known in the commercial community. In addition, he noted:

... although it appears to me that the appellants were engaging in some operations which relate to what the ordinary person would consider banking, i.e., taking of deposits, issuing letters of credit and loaning money, they were not in the banking business as described in the case law.

It would seem that the conviction of Mr. Milelli and the Canadian Credit Bank was justified on the simple basis that the accused held their operations out to the public as a bank. Section 310 of the Act prohibits any business engaged in financial activities which is not a bank from using the word "bank", "banker", or "banking" in its name. The company letterhead, blank forms, advertisements and the corporate seal all bore the name of Canadian Credit Bank Limited, a clear statement to the public that they were dealing with a bank, and by implication, a Canadian bank. It is curious that the Crown did not rely on this argument.

2. Court of Appeal

The Court of Appeal reversed the District Court judgment, with Mr. Justice Finlayson writing the judgment for the court. Crown counsel's argument was that s. 173 of the Act contains the components of banking business, and as such, if he could prove that Canadian Credit Bank had engaged in any of the enumerated activities, the court would have grounds to convict Mr. Milelli. While the Crown, strictly speaking, was correct in its assertion that the bank's activities should warrant a conviction, his logic was misguided. Finlayson J.A. rightly pointed out that, "[c]learly, s. 173 is permissive and not definitive of "banking business"".65a

64 Ibid.
65 There are certain exceptions, for example, if it is a representative office, but Canadian Credit Bank's operations extended beyond those permitted for a representative office, and there is no evidence that it fell within any of the other exceptions.
Mr. Justice Finlayson noted that the District Court had accepted the submission of the respondents that a bank must be “in the business of banking in Canada”, rather than merely engage in isolated transactions within s. 173 to contravene the Act. He noted the significance of Judge LeSage’s express omission of the word “any” in the phrase “undertake any banking business in Canada”. Finlayson J.A. emphasized that the authorities relied on by the District Court judge, including the activities of the corporation in Bergethaler Waisenamt and Lord Denning’s test of the “essential” features from United Dominions Trust as cited in Canadian Pioneer, dealt with constitutional interpretation. Justice Finlayson suggested that these might not be appropriate precedent for interpreting the Bank Act when he stated:

In both Canadian Pioneer and Bergethaler Waisenamt, the examination of the functions of the trust companies was being made to determine if they were in the banking business to a degree that would attract federal jurisdiction. ... In our case, we have the concession by the respondents and the finding by the trial Judge that the respondent bank is a foreign bank within the definition of the federal legislation and we are called upon to determine only if that foreign bank is carrying on in Canada any banking business.

Despite his criticism of the District Court judge’s reasoning, Mr. Justice Finlayson refrained from substituting his own definition. Instead, he simply asserted that, whatever the definition of banking business is, the District Court got it wrong:

... on any definition of banking business, the three findings of the trial judge as to the activities of the respondent bank ... are clearly within the prohibition in s. 302 of the Bank Act against a foreign bank undertaking “any banking business in Canada”. These findings are included among those enumerated in s. 173 of the Bank Act and are within what, in common knowledge, would be considered the hard core of banking.

Presumably, Mr. Justice Finlayson was satisfied that the word “any” before “banking business” is sufficient to trigger reliance on the broad provisions of s. 173 as the definition of “banking business” for s. 302(1)(a). However, he did not affirm this as a general rule. He was equally satisfied that Mr. Milelli’s activities fell within the “hard core” conception of banking that has

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66 See, supra, footnote 52, for the enumerated functions. Note that it is narrower than the provisions of s. 173.
67 Supra, footnote 47, and accompanying text.
68 Supra, footnote 65a, at p. 171 C.C.C., p. 215 B.L.R.
69 Ibid., at p. 171 C.C.C., pp. 215-16 B.L.R., emphasis added.
developed in the Canadian constitutional and English banking jurisprudence.

As discussed earlier, the definition of banking in s. 173 is completely open-ended, as suggested by its preamble statement: "without limiting the generality of the foregoing". On the other hand, the "hard core" of banking is narrowly defined, contemplate, in essence, the mere acceptance of deposits to be withdrawn by cheque. It is noteworthy that, strictly speaking, Milelli and Canadian Credit Bank’s issuing letters of credit, lending money and accepting term deposits were not within the traditional "core" of banking in the sense that Canadian constitutional and English banking jurisprudence would define it. However, it appears that Mr. Justice Finlayson favoured flexible over rigid reasoning in reaching the conclusion that the bank’s activities fit into the narrow as well as the broad definition. Indeed, perhaps this was evidence of the court's discomfort with settling on the broad definition.

IV. CONCLUSIONS

In the end, the Court of Appeal clearly felt it was not in a position to use the Milelli decision as a vehicle for rewriting the foreign banking provisions of the Bank Act. The task of deciphering the logic of the statute’s foreign banking provisions is formidable indeed, and neither courts, lawyers, nor foreign banks can rectify enigmatic drafting. The result, however, leaves foreign banks as unenlightened as when the exercise began.

So, then, what did the drafters really intend the meaning of "any banking business" to be? As I have argued in this article, the construction of the foreign banking provisions is ambiguous. The definition could be interpreted as broad, looking much like the s. 173 definition of "business of banking". However, this really begs the question of why the framers chose the term "banking business" in the first place. Even within the foreign banking provisions themselves, the term "business of banking" is used in the context of foreign bank affiliates. If the drafters had intended that the two terms have the same meaning, it is curious that they used two different expressions within the same set of provisions.

Recall that the "core functions" test, if any, was Coyne J.A.'s "receiving money to be withdrawn by cheque" (supra, footnote 53 and accompanying text), much the same as Lord Denning’s "essential" features in United Dominions Trust, supra, footnote 47.
Perhaps the reason for avoiding the term "business of banking" is that the framers felt that foreign banks should be able to continue to engage in financial activities in Canada in various diluted forms.\(^7\) They might do so, for example, through isolated guarantees to affiliates and subsidiaries. They also might do so through minority participation in loan agreements, and in cases where they purchased a syndicated loan or participation agreement, through the various administrative activities ancillary to lending money, such as registering\(^7\) and enforcing\(^7\) the security. Thus, perhaps a term imposing a blanket prohibition on all activities of foreign banks was adjudged excessive.

Instead, the drafters may have felt that a narrow prohibition (comprising only banking in the sense of a banking business), followed by a number of exceptions relating to activities in connection with subsidiaries and affiliates, would best achieve the legislative purpose. But to choose not to define the term "banking business", and in addition, to precede it with the ambiguous word "any", was to create difficulties that need never have arisen.

As mentioned above, the Act sets out several qualifications to the base prohibition on "any banking business". Again, when viewed in their totality, these provisions may be interpreted as a broad prohibition, severely circumscribing the activities of foreign banks. But a foreign bank threatens Canadian banking interests only if its activities are tantamount (alone, or in combination with other companies controlled by the foreign bank) to those of what, in essence, our banking laws purport to regulate: Canadian banks. By "Canadian banks" I mean those entities which perform the essential elements of banking. A more "functional" view, which

\(^7\) And recall, of course, that in addition to "diluted" activities, a foreign bank, if it is willing to incorporate a subsidiary under the terms of the Bank Act, can carry on in the same way as any Canadian chartered bank.

\(^7\) In *Koh Kim Chai v. Asia Commercial Banking Corp. Ltd.*, [1984] 1 W.L.R. 850 (P.C.), an English case dealing with a Malaysian provision very similar to s. 302(1)(a) of the Bank Act, the Privy Council held that the minor elements of the charge on security for a loan by a Singaporean bank could be carried out in Malaysia without contravening the statute. In *Euclid Avenue Trusts Co. v. Hohs* (1909), 23 O.L.R. 377, the Ontario Divisional Court allowed the reperfection in Ontario of a mortgage agreement prepared in Ohio but inadvertently faulty in its original perfection, despite a provision in the statute prohibiting the parties from carrying on business in Canada.

\(^7\) Canadian conflict of laws rules suggest that where land is situated in Canada, a court outside Canada would have difficulty enforcing security on that land: *Duke v. Antler*, [1932] 4 D.L.R. 529, [1932] S.C.R. 734. It seems unlikely that the Act would prohibit the entry of a foreign bank for this purpose.
envisages banks as financial “intermediaries”, that is, responding generally to the interests of the public in solvency and the redistribution of monetary resources, would comprise a wider range of institutions such as insurance, trust and mortgage companies. The activities of these institutions are regulated by other statutes and, as such, the application of the Bank Act is redundant where they are concerned.

Thus, from a policy perspective, it would seem that the Act need only prohibit banking in the narrow or “core” sense to achieve its purpose. If a foreign bank undertakes an isolated transaction, but does so in connection with an affiliate or subsidiary such that the combined operations of the two entities comprise the core features of banking, the prohibition of that isolated transaction is also warranted. If indeed, this is what the drafters of the Bank Act intended, they should have taken greater care in crafting the statute.

What, then, would make the Bank Act easier to understand? The simplest approach to the problem would be to define explicitly the term “banking business” and substitute the word “a” for “any” in s. 302(1)(a). In addition, I would suggest clarifying the limits of permissible relations between foreign banks and their subsidiaries or affiliates. If indeed, there are constraints on a range of activities (albeit not constituting the “core” of banking) that foreign banks can do, this should be made obvious. Rather than burying them among the exceptions to the permitted activities of subsidiaries and affiliates, they could be presented as exceptions to the permitted activities of the foreign banks themselves. The simplest way to do this might be to expand s. 302 itself, to include two additional paragraphs which prohibit loans from or guarantees to a subsidiary (unless in the ordinary course of business and for short-term liquidity purposes only), and guarantees to a non-bank affiliate (where that non-bank affiliate carries on as part of its business any aspect of the business of banking, as defined in s. 173). Amendments such as this might be first steps to creating a statutory regime of greater clarity and simplicity. Greater legal predictability will benefit not only foreign banks, but also the expanding number of Canadian banks wishing to enter transactions in co-operation with the international banking community.

McDonald describes this as the 19th-century economic view of banks: P. McDonald, "The B.N.A. Act and the Near Banks: A Case Study in Federalism" (1972), 10 Alta L. Rev 155, at p. 158.